SUWIRI SDN BHD

v.

GOVERNMENT OF THE STATE OF SABAH

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LINTON ALBERT JC
[SUIT NO: K 22-69-2000]
30 OCTOBER 2004

TRADE AND INDUSTRY: *Forestry - Licence to take timber - Application by plaintiff for renewal or extension of timber licence refused by defendant - Whether defendant bound to extend licence - Whether defendant had valid excuses for refusal - Whether plaintiff had waived its right for extension - Whether non-approval by defendant a violation of plaintiff's legitimate expectation*

CONTRACT: *Agreement to extract timber - Breach - Application by plaintiff for renewal or extension of timber licence refused by defendant - Whether defendant bound to extend licence - Whether defendant had valid excuses for refusal - Whether plaintiff had waived its right for extension - Whether non-approval by defendant a violation of plaintiff's legitimate expectation*

The plaintiff, which was granted a timber licence to fell and extract timber in a forest reserve (valid from 13 March 1993 to 13 March 1998), was aggrieved by the defendant's refusal to renew or extend the validity of the timber licence, and commenced proceedings claiming damages and various declaratory reliefs. Instead of the renewal or extension sought by the plaintiff, the defendant had issued a new licence confining the plaintiff to a substantially reduced area of 2204.41 hectares, with the rest of the area under the timber licence, measuring 3461.18 hectares, being distributed to three other companies under separate licences. The plaintiff's case rested on condition 21 of the timber licence that entitled the plaintiff to renew or extend the timber licence. The plaintiff, believing that it could not complete the extraction of timber within the period given in the timber licence, applied to the Setiausaha Hasil Bumi ('SHB') for an extension of the timber licence beyond 13 March 1998. By a letter dated 25 November 1997, the SHB approved the application and instructed the Director of Forests to renew the timber licence. The plaintiff contended that there was a binding contract to renew the timber licence upon SHB communicating the approval letter to the plaintiff.

Held (allowing the plaintiff's claim):

[1] In the present case, the approval letter constituted a promise made in response to the plaintiff's application for renewal under the timber licence. The fact that the approval letter was not addressed to the plaintiff did not diminish its effectiveness because it was inextricably linked to condition 21 of the timber licence, under which the plaintiff was entitled to a renewal or extension of the timber licence. Here, the condition for the extension of the timber licence was the inability of the plaintiff to complete the extraction of timber due to causes beyond the control of the plaintiff. This condition was fulfilled when the plaintiff conveyed to the SHB its failure to complete extraction within the area under the timber licence due to various stated reasons. The approval letter by the SHB incontrovertibly implied that these reasons were considered and had led to the approval for the extension of the timber license. Hence, there was a concluded contract binding the defendant to fulfil its promise to extend the timber licence. (pp 71 h & 72 a, f-h)

[2] The only conceivable impediment to extending the period of extraction within the 3416.18 hectares would have been the total lack of timber stands therein. This was not the case because the same was apportioned and licensed to three other companies for timber extraction and the allegation that the coupes had been closed was contradicted by the then acting Director of Forests in a letter dated 16 February 1998 confirming that the plaintiff's application for extension was not approved. These were mere imaginary excuses offered by the defendant. (p 73 c-d)

[3] The defendant's argument that the plaintiff had waived its right to an extension of the timber license as the plaintiff had extracted timber within the 2,204.41 hectares under the new form 1 licence, had no merit. There was never any intention on the part of the plaintiff to waive its right, as there was ample evidence to show the plaintiff's relentless pursuit of the extension to the timber licence even after the form 1 licence for the balance of the area was issued to the plaintiff. (pp 73 f-h & 74 a)

[4] For the aforesaid reasons, the plaintiff had established its case. (p 74 d)

[5] It was abundantly clear that the non-approval of the application to renew or extend the timber licence was a violation of the plaintiff's legitimate expectation. There was no reason given in DW1's letter nor was the plaintiff given an opportunity to present its case before the decision was made. The SHB had assured the plaintiff that its application would be approved and had also written to DW1 to extend the plaintiff's timber licence which DW1 chose to totally ignore, managing only to produce imaginary excuses at the trial and leaving the real reason for the apportionment of the 3461.18 hectares to three other companies, a mystery. (p 76 c-e)

[Judgment in the sum of RM21,890,113.75 with interest thereon at 8% per annum from date of judgment till full settlement entered for plaintiff.]

Case(s) referred to:

Beswick v. Beswick [1968] AC 58 ***(dist)***

Charles Grenier Sdn Bhd v. Lau Wing Hong Sdn Bhd [1997] 1 CLJ 625 FC ***(foll)***

Halimah Abdul Rahman v. Fatimah Abdullah [1976] 2 MLJ 64 ***(refd)***

Kwek Seow Kee & Anor v. KT Packaging Sdn Bhd [1998] MLJU 36 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 FC ***(refd)***

Muniandy Thamba Kaundan v. D & C Bank Bhd [1996] 2 CLJ 586 FC ***(foll)***

R v. Devon County Council, ex p Baker & Anor R v. Durham County Council, ex p Curtis & Anor [1995] 1 All ER 73 ***(foll)***

R v. Secretary of State For The Home Department, ex p Khan [1985] 1 All ER 40 ***(refd)***

For the plaintiff - Marina Tiu; M/s Yap Chin & Tiu
For the defendant - Juprin Wong-Adamal; Senior State Counsel

Reported by Suresh Nathan

JUDGMENT

Linton Albert JC:

The plaintiffs were granted a licence (the Timber Licence) to fell and extract timber in a forest reserve in the Keningau Region comprising an area of 5,665.59 hectares. The Timber Licence was valid from 13 March 1993 to 13 March 1998. The plaintiffs were aggrieved by the defendants' refusal to renew or extend the validity of the Timber Licence. Instead of the renewal or extension sought by the plaintiffs the defendants had issued a new licence confining the plaintiffs to a substantially reduced area of 2204.41 hectares, and the rest of the area under the Timber Licence measuring 3461.18 hectares was distributed to three other companies under separate licenses. The plaintiffs commenced proceedings claiming damages and various declaratory reliefs.

The plaintiffs' case rested on Condition 21 of the Timber Licence which is as follows:

> If the Licensee shall be prevented by Act of God, war, acts of the enemies of Malaysia, civil commotion, or by any industrial dispute or other cause beyond the Licensee's control, from carrying out his obligations under Condition 6(i) and (ii), the Government shall grant to the Licensee such extension of time or other modifications in the Licensee's obligations under these conditions, as may be reasonable and necessary, having regard to all the circumstances.

The plaintiffs had reckoned that they could not complete the extraction of the timber within the period giver in the Timber Licence and on or about 22 July 1997, some eight months before it was due to expire, applied to the Setiausaha Hasil Bumi (SHB) one, Datuk William Shim, for extension of the Timber Licence beyond 13 March 1998. By a letter dated 25 November 1997 (The Approval Letter) the SHB approved the application and in that letter instructed the Director of Forests to renew the Timber Licence. The relevant portions of the approval letter were as follows:

JABATAN KETUA MENTERI
(CHIEF MINISTER'S DEPARTMENT)
KOTA KINABALU

25 November 1997

Pengarah Perhutanan
Jabatan Perhutanan
Beg Berkunci No. 68
90009 Sandakan

PERMOHONAN PEMBAHARUAN LESEN HUTAN NO: JP(NNN)042/93(SP) SELUAS 5,665.59 HEKTAR DI SG. TALANGKAI OLEH SUWIRI SDN BHD Bil. JP(P&P)00/02/01/3/142/26 bertarikh 29 Ogos 1997

2. ...

3. ...

4. Setelah permohonan ini dikaji dan diatas penjelasan seperti surat Bil: SWR/KPPW/97/11/1-001 bertarikh 13 November 1997 yang dialamatkan kepada Ketua Pegawai Perhutanan Wilayah, Keningau dan latar belakang aktiviti pembalakan yang dijalankan dalam kup 1993 (JP(NNN)042/93(SP) dan kup 1994 (JP(NNN)042/92(SP), permohonan syarikat untuk memperbaharui keseluruhan kawasan seluas 5,665.59 hektar adalah dipersetujui tertakluk kepada kajian lapangan oleh pihak tuan dan tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968. Lesen hutan yang akan dikeluarkan adalah bagi tempoh sehingga 31.12.1999.

...

tt
(DATUK WILLIAM SHIM)
Setiausaha Hasil Bumi).

Learned counsel for the plaintiffs, Datin Marina Tiu contended that upon SHB communicating the approval letter to the plaintiffs there was a binding contract to renew the Timber Licence. Learned counsel for the defendants disagreed, and contended that the defendants could not be contractually bound to renew or extend the Timber Licence because under Condition 6(vi) a coupe which had been logged and closed ceased to be part of the area under the Timber Licence and therefore, the plaintiffs could not require the defendants to renew or extend the Timber Licence as this would have been contrary to the very provisions of the Timber Licence. With respect, this argument may well find favour within the realm of semantics but is otherwise untenable because there is nothing technical or magical about a coupe; it simply refers to a defined portion within the area under the Timber Licence. The area under the Timber Licence is divided into several portions each of which is called a coupe. This is done so that timber extraction is carried out progressively and this is illustrated by and provided under Conditions 6(i) and (ii) of the Timber Licence. Reliance by the defendants on Condition 6(iv) of the Timber Licence is also misconceived because no special significance can be attached to it as it merely refers to the clearing and demarcation of the coupe boundaries within the area under the Timber Licence. I do not think there is a need to seriously consider the defendants' objection regarding the alleged oral approval for the renewal of the Timber Licence by the SHB because the plaintiffs rely on the written approval under the approval letter, which brings me to the question arising out of the contention by learned counsel for the defendants to the effect that the plaintiffs cannot rely on the approval letter because it is an internal correspondence between SHB and the Director of Forests to which the plaintiffs are never privy. It is therefore argued that the doctrine of privity of contract applies, a proposition which, in my view, is ill-founded because the facts in the present case are distinguishable from those in the authorities cited by Mr. Juprin Wong-Adamal which concerned situations where a total stranger sought to enforce a contract, as for example in *Beswick v. Beswick* [1968] AC 58, where there was an agreement between a coal merchant and his nephew to the effect that in return for the transfer of the coal merchant, business to the nephew, the nephew promised to employ the coal merchant as consultant during his lifetime and after his death to pay an annuity to his widow and the House of Lords held that the widow was not entitled to the annuity in her personal capacity because she was not a party to the contract. In the present case, however, the approval letter constitutes a promise made in response to the plaintiffs' application for renewal under the Timber Licence

and the fact that the approval letter is not addressed to the plaintiffs does not, in my view, diminish its effectiveness because it is inextricably linked to Condition 21 of the Timber Licence under which the plaintiffs are entitled to a renewal or extension of the Timber Licence,

I shall now turn to consider some of the authorities cited by Datin Marina Tiu. In *Halimah binti Abdul Rahman v. Fatimah binti Abdullah* [1976] 2 MLJ 64 the vendor sought to resile from an agreement with the purchaser in respect of a parcel of land the vendor had applied from the Government through the land office and agreed to sell the land to the purchaser for RM300 which the vendor received, promising to transfer the land to the purchaser when the documents of title were issued but when the documents of title were issued by the Government the vendor refused to complete the sale. The Federal Court held that the plaintiff was entitled to specific performance and the reason was this:

> I think that the purchaser's claim should have been allowed, because the sale here was not an out-right sale, but a conditional sale, to be completed when the vendor's application has been approved by the State. Just as it is legal for some one to sell rubber which he does not have but which he plans to buy and own on a future date, when it is to be delivered, so it is in my opinion equally legal for some one to sell State land on condition that the deal will be completed if and only if the vendor's application for the land has been successful and the State has issued a title to him. (per Suffian, LP at page 65)

In *Kwek Seow Kee & Anor v. KT Packaging Sdn Bhd* [1998] MLJU 36 it was held that a contract may exist as a fact although it could not be analysed precisely into offer and acceptance, provided that the terms had been fully agreed and executed by the parties. Here, the condition for the extension of the Timber Licence was the inability of the plaintiffs to complete extraction of timber in the designated coupes due to causes beyond the control of the plaintiffs and this condition was fulfilled when the plaintiffs conveyed to the SHB their failure to complete extraction of the timber within the area under the Timber Licence due to continual adverse weather in the years prior to the application for renewal, time spent on construction of access roads, collapse of bridges and the lengthy process of coupe application. The approval letter by the SHB incontrovertibly implied that these were considered and had led to the approval for the extension of the Timber Licence. These composite elements constituting the agreement which came into existence at the time the approval letter was issued may well defy characterization into offer and acceptance but the fact remained that there was then a concluded contract binding the defendants to fulfil its promise to extend the Timber Licence.

I will not go to the extent of having to denigrate the whole testimony of DW1, the then acting Director of Forests, who was called to give evidence on behalf of the defendants, as suggested by learned counsel for the plaintiffs, but what I find and can, without hesitation say, is that DW1's testimony clearly revealed the defendants' pathetic attempt to wriggle out of its promise to extend the Timber Licence. DW1 testified that the Timber Licence was not renewed because part of the area under the Timber Licence comprising approximately 3461.18 hectares had been logged by the plaintiffs and was within coupes that had been closed. The only conceivable impediment to extending the period of extraction within the 3461.18 hectares would have been the total lack of timber stands therein which was not the case because the same was apportioned and licensed to three other companies for timber extraction and the allegation that the coupes had been closed was contradicted by DW1 in his letter dated 16 February 1998 which confirmed that the plaintiffs' application for extension was not approved and concluding as follows: "Dengan ketetapan ini, kawasan-kawasan lain Lesen Hutan ... diperiksa tutup." These imaginary excuses offered by the defendants, epitomized what was viewed with disapproval in *Charles Grenier Sdn Bhd v. Lau Wing Hong Sdn Bhd* [1997] 1 CLJ 625 where Gopal Sri Ram JCA, delivering the judgment of the Federal Court had this to say at p. 633:

> Unless the approach we have stated is adopted, a party to a contract who – after having concluded his bargain – entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

Learned counsel for the defendants contended that it was not open to the plaintiffs to insist on their right to an extension of the Timber Licence when they had accepted the balance of the area under the Timber Licence not previously logged by them under a new Form 1 licence for 2,204.41 hectares. It was pointed out that the plaintiffs not only accepted but went on to extract timber within the 2,204.41 hectares under the new Form 1 licence. Hence, it was argued, the plaintiffs had waived their right to an extension of the Timber Licence. Apart from the fact that this issue was not pleaded, as rightly pointed out by Datin Marina Tiu, there was also no merit in this plea because for waiver to operate there must be an intention to waive and here, there was never any intention on the part of the plaintiffs to waive their right as there was ample evidence to show the plaintiffs' relentless pursuit of the extension

to the Timber Licence even after the new Form 1 Licence for the balance of the area was issued to them. A similar situation arose in *Muniandy a/l Thamba Kaundan v. D & C Bank Bhd* [1996] 2 CLJ 586 where the issue of waiver was explained by Edgar Joseph Jr FCJ at p. 598.

> The sixth and last point I should like to deal with concerns the contention by counsel for the chargees that the chargors' summons in chambers to set aside the *ex parte* order was barred by waiver, in that, following the judicial sale by public auction to the purchaser, the chargors had, in response to a letter written to them by the solicitors for the chargees, called at the latter's office and collected the balance of the proceeds of sale after deduction of the money payable under the charge and the usual expenses.
>
> In my view, there can be no waiver in the absence of an intention to waive. Here, the chargors were ignorant laypersons, who were unrepresented and obviously knew nothing about their legal rights. In the words of Lord Chelmsford LC in *Darnley (Earl of) v. Proprietors of London, Chatham and Dover Rly* [1867] LR 2 HL 43 at p 57, 'A waiver must be an intentional act with knowledge.' In these circumstances, the chargors' acceptance of the money could not be construed as an intention to waive those rights.

For the reasons aforesaid I accordingly hold that the plaintiffs have established their case.

Finally, I shall turn to consider the plaintiffs' alternative plea that their legitimate expectation had been violated. The concept of legitimate expectation is illustrated in numerous authorities some of which have been brought to my attention by learned counsel for the plaintiffs. I propose to reproduce some of the passages from these authorities which are, in my view, relevant to determine the issue of legitimate expectation. In *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* (Edgar Joseph FCJ) [1999] 3 CLJ 65 at p. 140:

> In the words of Lord Denning MR in *Laker Airways Ltd v. Department of Trade* [1977] 1 QB 643 at p 708A: "If it is found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject then these courts must so declare. They stand as ever between the executive and the subject, alert, as Lord Atkin said in a famous passage: 'alert, to see that any coercive action is justified in law' – see *Liversidge v. Anderson* [1942] AC 206 at p 244. To which, I would add, alert to see that a discretionary power is not exceeded or misused. (per Edgar Joseph Jr, FCJ)

In *R v. Secretary Of State For The Home Department, Ex Parte Khan* [1985] 1 All ER 40 at p. 47:

> "legitimate expectations" in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. (my emphasis).
>
> (See [1983] 2 All ER 346 at 350, [1983] 2 AC 629 at 636.)
>
> > The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.

And in *R v. Devon County Council, Ex Parte Baker And Another, R v. Durham County Council, Ex Parte Curtis & Another* [1995] 1 All ER 73 at pp. 88-89:

> It is first, I think convenient to identify, at least in broad categories, various of the distinct sense in which the phrase 'legitimate expectation' is nowadays used.
>
> (1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. ...
>
> These various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. ...
>
> (2) Perhaps more conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. ...

> (3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him ...
>
> (4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice.

Applying these principles to the established facts in the present case, it is abundantly clear that the non-approval of the application to renew or extend the Timber Licence was a violation of the plaintiffs' legitimate expectation. No reason was given in the letter dated 19 February 1998 nor was the plaintiffs given an opportunity to present their case before the decision was made. The SHB had assured the plaintiffs that their application would be approved and had also written to the Director of Forests to extend the plaintiffs' Timber Licence which DW1 chose to totally ignore, managing only to produce imaginary excuses at the trial and leaving the real reason for the apportionment of the 3000 odd hectares he refused to approve for the plaintiffs, to three other companies, still shrouded in mystery. These circumstances lend support to the plaintiffs' alternative plea and I accordingly hold that the plaintiffs have succeeded in establishing it.

The loss and damages suffered by the plaintiffs in consequence of the defendants' breach of the contract to renew the Timber Licence amounted to RM21,890,113.75. How this was arrived at was explained by PW2 in her unchallenged testimony which was clear and comprehensive. I do not, however, accept the view that the plaintiffs ought to be entitled to an additional sum to reflect the alleged decline in value of our currency since the breach occurred in 1998 because no evidence was led to support it. I do not also find it necessary to consider the declaratory reliefs relating to the defendants' violation of the plaintiffs' legitimate expectation because they were not seriously pursued by the plaintiffs and had since been rendered essentially academic. In the circumstances, I allow the plaintiffs' claim for loss and damages and accordingly enter judgment for the plaintiffs in the sum of RM21,890,113.75 with interest thereon at 8% per annum from date of judgment till full settlement. I also order costs for the plaintiffs to be taxed unless agreed.